

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION TO CHANGE WATER) RIGHT NO. 41I 30152338 BY LEONARD H) & PAMELA K LAMBOTT)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On November 22, 2021, Leonard H and Pamela K Lambott (Applicant) submitted Application to Change Water Right No. 41I 30152338 to change Statement of Claim 41I 831-00 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated May 17, 2022. The Applicant responded with information dated September 14, 2022. The Applicant requested a minor amendment to their Application via an email dated January 17, 2023; application timelines were not reset. The Application was determined to be correct and complete as of December 13, 2022.

The Department met with the Applicant's Attorney, Abby Brown, on May 25, 2021, for a pre-application meeting. Russ Gates (DNRC Hydrologist/Water Resource Specialist) and Kristeen Wofford (DNRC Water Resource Specialist) were present for the Department. The Department met with the Applicant and Abby Brown on January 6, 2023, to discuss the Department's Technical Report. Mallory Scharf (DNRC Water Resource Specialist) and Jennifer Daly (Helena Water Resources Regional Manager) were present for the Department. An Environmental Assessment for this Application was completed on April 7, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change an Existing Irrigation Water Right, Form 606 IR

- Letter from Abby Brown dated November 19, 2021, to all other water right owners sharing the point of diversion or means of conveyance for the water right proposed for change (Statement of Claim 41I 831-00), pursuant to § 85-2-302(4)(c), MCA
- Maps
 - Historical and Current Place of Use Map, Conveyance System Map, and Proposed Place of use Map
- Excerpts from 1956 Broadwater County Water Resource Survey (WRS)
 - Page 26 and 27 explaining the history of the Broadwater-Missouri Water Users' Association (BMWUA) and Canals
 - WRS Field Notes for Township (T) 07N, Range (R) 02 East, depicting historic use of Claim 41I 831-00
 - Irrigation maps for T06N, R02E, and T07N, R02E, Broadwater County
- Excerpts from file for Claim 41I 831-00 showing the apportionment of 34 Miner's Inches (MI) to David T and Judy D Rowland, the original claimants for Claim 41I 831-00
- Copy of Montana Water Court Order Amending Claims for Water Court Case WC 2016-06, filed August 7, 2018
- Photos of the High Water Spill headgate, Parshall flume in the High Water Spill Ditch, lockboxes for Commissioner water records at the Parshall flume, and the concrete spill structure from the High Water Spill Ditch into the Broadwater Missouri Eastside Canal
- Discharge records for the High Water Spill Ditch from the 2020 irrigation season
- Water Right Purchase and Sale Agreement for sale of Claim 41I 831-00 from Double C Properties LLC to Leonard Lambott, with accompanying Quit Claim deed conveying Double C Properties LLC's interest in Claim 41I 831-00 to Leonard and Pamela Lambott
 - After Department receipt of this Application, this deed was recorded on December 1, 2021, as document #192002 with the Broadwater County Clerk and Recorder

Information Received after Application Filed

- Deficiency Response Letter from the Applicant, received by DNRC on September 14, 2022, along with exhibits:

- A – Signature page from Form 606 IR with original signatures from Leonard H and Pamela K Lambott
- B – Minutes from BMWUA Meeting on September 3, 1969, discussing implementation of Deep Creek Diversion Structure to transport decreed water
 - Additional copies of WRS field notes
 - 1938 aerial photo showing ditches to be displaced by installation of Broadwater-Missouri East Side Canal, poor copy
- C - Deep Creek water commissioner records for intermittent years between 1968 and 2020
- D – Pump curve for pump at proposed secondary point of diversion

Information within the Department’s Possession/Knowledge

- Aerial photos and topographic maps
- DNRC water right records, including files for the Statement of Claim proposed to be changed
- DNRC Pre-Application Meeting Checklists, dated November 12, 2020, and May 25, 2021
- DNRC Deficiency Letter, dated May 17, 2022
- DNRC Water Sciences Bureau Surface Water Change Report, dated December 13, 2022, and an updated version of the Report dated February 9, 2023, incorporating the Applicant’s January 17, 2023, amendment
- DNRC Technical Report, dated December 13, 2022
- DNRC Memo explaining updates to the Technical Report, dated January 10, 2023
- Emails between Abby Brown and Mallory Scharf dated January 10 – January 17, 2023, discussing the Applicant’s minor amendment to the Application
- DNRC Memo summarizing the partial sever of Claim 41I 831-00, dated February 3, 2023
 - Other relevant files include the Applicant’s filed Form 641, emails between Abby Brown and Mallory Scharf between December 2021 and January 2023, recorded deeds, and letters to other individuals with ownership interest, all in the Claim file
- Irrigation Water Requirements (IWR) Program, from the USDA Natural Resources Conservation Service

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.

- DNRC Return Flow Memo, dated April 1, 2016
- DNRC Use of Irrigation Water Requirements (IWR) Program Memo, dated February 4, 2013
- DNRC Assessment of new consumptive use and irrecoverable losses associated with change applications Memo, dated April 15, 2013
- DNRC Development of standardized methodologies to determine Historic Diverted Volume Memo, dated September 13, 2012

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicant proposes to change Statement of Claim 41I 831-00, with a priority date of April 1, 1870. The Claim is for diverting surface water from Deep Creek, tributary to the Missouri River, by means of headgate in the SWSWSE Section 3, T06N, R02E, in Broadwater County. The Claim lists the High Water Spill Ditch, along with the BMWUA East Side Canal (Canal) as a secondary carrier to convey water to the place of use for the purpose of irrigation. The Claim has been severed from its 103-acre irrigated place of use in the SE Section 21, T07N, R02E, in Broadwater County. The place of use is generally located approximately two miles northeast of Townsend, Montana. The Claim's periods of diversion and use are May 1 – July 19. The maximum flow rate for this Claim is 374.21 gallons per minute (GPM), with a volume not to exceed the amount put to historical and beneficial use. Table 1 lists the elements associated with the Claim proposed for change in this Application.

Table 1. Water Right Proposed for Change

Water Right #	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date	Acres
41I 831-00	Irrigation	374.21 GPM	Not to exceed the amount put to historical and beneficial use	05/01 – 07/19	SWSWSE Sec. 3, T06N, R02E	SE Sec. 21, T07N, R02E	04/01/1870	103

2. No other private water rights are supplemental to this Claim. This Claim is supplemental to water delivered under contract by the BMWUA.

3. The Applicant owns the entire ownership share of Claim 41I 831-00. Claim 41I 30159497 was split from Claim 41I 831-00 during the processing of a partial sever of Claim 41I 831-00. The filed Form 642 requesting the sever was received by the Department on December 15, 2021, and processed by the Department on February 1, 2023, following the resolution of deficiencies in the filing. The details of this partial sever are summarized in a February 3, 2023, Department Memorandum, a copy of which has been added to the file for this Application.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the irrigation place of use of Claim 41I 831-00 to 264.7 acres in Section 21, T07N, R02E, in Broadwater County. A detailed breakdown of the acreage and legal land descriptions for the proposed place of use is in Table 2, below. The proposed place of use is north and west of the current place of use; both current and proposed places of use are contained within the same section – Section 21, T07N, R02E, in Broadwater County. The proposed place of use acres are all outside the claimed place of use. The proposed 264.7 acres include 181 acres which are currently irrigated by Claim 41I 30913-00 and 83.7 acres which do not have any

appurtenant private water rights. All of the proposed 264.7 acres are within the service area for the BMWUA and will receive supplemental contract water as needed. The purpose of the proposed change is to lessen the Applicant's reliance on contract water from BMWUA, as Claim 41I 30913-00 has an inadequate flow rate (1.5 CFS) to irrigate 181 acres within its 200-acre claimed place of use and the 83.7-acre portion of the proposed place of use is currently irrigated only with BMWUA contract water.

Table 2. Proposed Place of Use Acres

	Acres	Quarter Sections*	Section	Township	Range	County
<i>Proposed acres currently irrigated only with BMWUA contract water (83.7 acres)</i>	80	E2SW	21	07N	02E	Broadwater
	3.7	E2SWSW				
<i>Proposed acres served by Claim 41I 30913-00 (181 acres)</i>	77	E2NW				
	80	W2NE				
	24	W2E2NE				
	264.7					

*Some quarter sections from the Application have been adjusted to be more concise, in accordance with ARM 36.12.110(5).

5. No other elements of Claim 4I 831-00 are proposed for change. Under the proposed change, the Claim will continue to be diverted from Deep Creek via headgate at the High Water Spill Ditch, and will then be discharged from the High Water Spill Ditch into the Broadwater-Missouri East Side Canal (Canal). To facilitate the proposed change in place of use, the Applicant plans to move the Claim's secondary point of diversion (a pump in the Canal) approximately one-quarter mile down the canal (north) of the existing secondary point of diversion. From there, the water is proposed to be conveyed via an approximately 3,400-foot pipeline to the proposed sprinkler irrigation place of use. The proposed secondary pump, pipeline, and sprinkler infrastructure are already in place, as they are currently used to convey Claim 41I 30913-00 and BMWUA contract water.

6. The Applicant will be subject to the following measurement condition upon authorization of this change:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASURING DEVICE AT OR NEAR THE POINT OF DIVERSION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO THAT THEY ARE ABLE TO RECORD FLOW RATE AND VOLUME OF ALL WATER DIVERTED. MEASUREMENT RECORDS SHALL BE SUBMITTED EACH YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE, AND UPON REQUEST THEREAFTER. IF AFTER PROJECT COMPLETION THE DEPARTMENT NOTIFIES THE APPROPRIATOR THAT RECORDS ARE REQUIRED TO BE SUBMITTED, FAILURE TO SUBMIT RECORDS IN A TIMELY FASHION UPON REQUEST MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

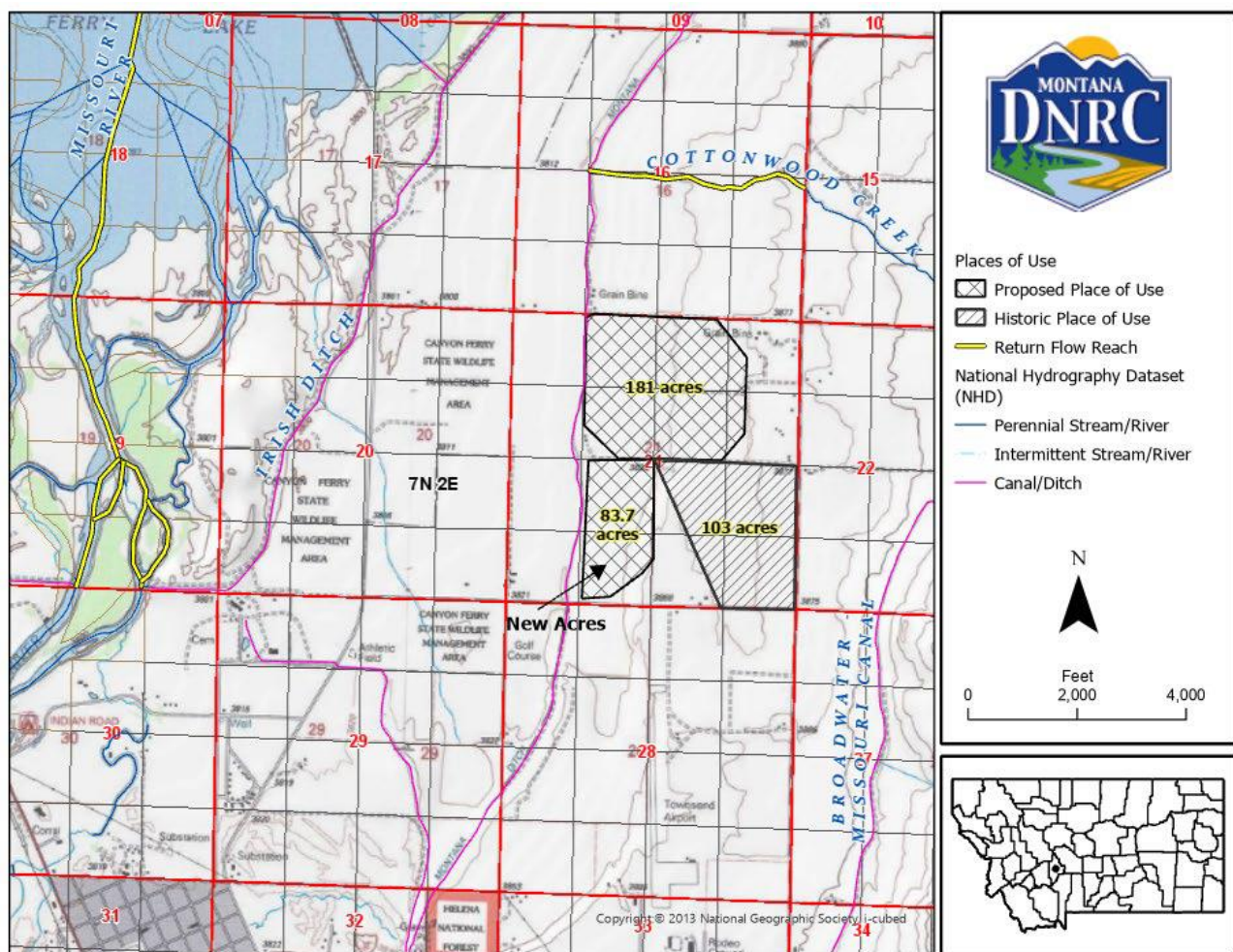


Figure 1. Map of Proposed Project Area (Department File). “New Acres” denote those acres in the proposed place of use that currently have no appurtenant private water rights. The 181-acre portion of the proposed place of use will be supplemental to Claim 41I 30913-00.

CHANGE CRITERIA

7. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Hohenlohe, at ¶¶ 29-31; Town of Manhattan, at ¶8; *In*

the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

9. Claim 41I 831-00 is part of the original Benjamin Harrison water right decreed in *Thompson et al v. Harvey et al*, Case No. 65 (Sixth Judicial District; May 2, 1891), with a priority date of April 1, 1870. The decreed right is for 150 MI (Miner's Inches) from Deep Creek. Documentation of this District Court Decree is included on pages 5-10 of the scanned file for Claim 41I 831-00.

10. Claim 41I 831-00 historically diverted water from Deep Creek using a headgate at the High Water Spill Ditch, located in SWSWSE Section 3, T06N, R02E, in Broadwater County. At the end of the 1,330-foot High Water Spill Ditch, water was then discharged from the Ditch and into the Canal which was used as a secondary carrier/means of conveyance. From a secondary point of diversion in the Canal located at SWSESW Section 22, T07N, R02E, water was turned out into an open irrigation ditch which then conveyed the water to the place of use. The 1956 Broadwater County WRS Field Notes show that the Benjamin Harris decreed water right was delivered to the historical place of use via the Canal. This Claim's historical use of the High Water Spill Ditch headgate was affirmed in Montana Water Court Certification Case WC 2016-03.

11. The 1956 Broadwater County WRS shows 105 acres of irrigation within the claimed place of use in SE Section 21, T07N, R02E. The listed acres on this Claim were reduced from 160 acres to 105 acres per the Water Master's Amended Report (filed July 28, 1998) in Montana Water Court Case 41I 336. This Amended Master's Report was filed after the original Claimants, David and Judy Rowland, filed an Affidavit with the Court on May 28, 1998, stating the number of acres irrigated with this Claim prior to July 1, 1973, was 105 acres. This affidavit is available on page 58 of the scanned file for Claim 41I 831-00. Upon processing the partial sever mentioned in FOF 3, two acres of the historic irrigation place of use were split off and are now represented on Claim 41I 30159497 only. As such, the Department finds a 103-acre historic irrigation place of use for Claim 41I 831-00.

12. The 1956 Broadwater County WRS Field Notes show that the Benjamin Harris Deep Creek water right was diverting 150 MI for flood irrigation. A document from the Claim file (page 4 of scanned documents) dated August 25, 1976, shows that the original Benjamin Harris water right was split on the basis of flood-irrigated acres, with 34 MI (381.48 GPM) apportioned to David and Judy Rowland, the original Claimants of 41I 831-00. Claim 41I 831-00 represents the Rowland portion of the 1870 Benjamin Harris water right. This 1976 document is available on page 4 of the scanned file for Claim 41I 831-00. Upon processing the partial sever mentioned in FOF 3, 7.27 GPM of the historic flow rate was apportioned to split Claim 41I 30159497, while the remaining flow rate of 374.21 GPM was apportioned to Claim 41I 831-00. As such, the Department finds the maximum historic flow rate for Claim 41I 831-00 to be 374.21 GPM.

13. Claim 41I 831-00 was historically used for flood irrigation. Though the Claim lists sprinkler irrigation, the sprinkler system was not installed until after July 1, 1973. An issue remark on the Claim is consistent with this fact, and the Applicant reaffirms in their deficiency response letter that the sprinkler system was installed in 1976 or 1977.

14. The Applicant has elected for the Department to calculate historic consumptive volume using ARM 36.12.1902. Claim 41I 831-00 is an early season water right and did not provide full-season irrigation to the 103-acre historic place of use. This Claim has a period of diversion and period of use of 5/1 – 7/19 (80 days) and was exercised through 7/19 or until it went out of priority. These 103 acres also historically received supplemental contract water from the BMWUA, after the period of diversion/use ended for this Claim. The historic consumed volume (HCV) for this Claim is quantified using the net irrigation requirements from the NRCS Irrigation Water Requirements (IWR) program. Standard IWR Program inputs are detailed in the DNRC's Irrigation Water Requirements (IWR) Program Memo, dated February 4, 2013. A season-long net irrigation requirement of 19.42 inches per irrigated acre was calculated for alfalfa for the Broadwater County (Townsend) weather station. To account for this Claim's period of diversion, the NIR was reduced to 10.09 inches per irrigated acre (1.26 inches in May + 4.85 inches in June + 3.98 inches in July [6.49 inches x 19 days of irrigation/31 days in July]). The 69.2% historical management factor for Broadwater County applied to the 10.09-inch net irrigation requirement results in 6.98 inches per irrigated acre. This figure multiplied by 103 acres irrigated equals 718.94

historic consumptive inches. Dividing this figure by 12 inches per foot to results in a 59.9 acre-foot (AF) historical crop consumptive volume. An estimated field efficiency of 60% for contour ditch flood irrigation with a slope of 0.75% results in a total historical field applied volume of 99.9 AF. Irrecoverable losses resulting from flood irrigation are assumed to be 5%, or 5.0 AF, of the total 99.9 AF applied volume. The Department finds the total historical consumptive use for flood irrigation of 103 acres with Claim 41I 831-00 from 5/1-7/19 is 64.9 AF (crop consumptive use plus irrecoverable losses).

15. The full flow rate for Claim 41I 831-00 was historically diverted at the secondary point of diversion where the Claim is diverted out of the Canal. Conveyance losses from the primary point of diversion at Deep Creek to the secondary diversion from the Canal were not considered because the Applicant explained in their deficiency response that the BMWUA historically conveyed this Claim via the Canal without charging for conveyance losses. This Claim, along with other decreed Deep Creek water rights conveyed via the Canal, are referred to by BMWUA as “transport rights”. Prior to July 1, 1973, an open irrigation ditch was used to convey water from the secondary diversion off the Canal to the place of use. The Department estimates based on aerial imagery that the conveyance ditch from the Canal to the start of the historic place of use was 1,540 feet long. This conveyance ditch is no longer in place, having been replaced by a pipeline when the irrigation method was switched to sprinkler irrigation in 1976 or 1977; dimensions for the historic ditch are therefore unavailable. As such, the Department used a flow rate over time calculation to find the historic diverted volume to be 132.0 AF ($374.21 \text{ GPM} / 226.67 = 1.65 \text{ AF/day} \times 80 \text{ days}$). Historic conveyance losses for the ditch are calculated to be 32.1 AF, where historic conveyance losses are equal to the historic diverted volume minus the applied volume ($132.0 - 99.9 = 32.1 \text{ AF}$).

16. The Department’s historic use findings for Statement of Claim 41I 831-00 are summarized in Table 3.

Table 3. Summary of Historic Use Findings for Statement of Claim 41I 831-00

WR Number	41I 831-00
Priority Date	04/01/1870
Diverted Volume	132.0 AF

Flow Rate	374.21 GPM
Acres	103 acres
Consumptive Use Volume	64.9 AF
Place of Use	SE Section 21, T07N, R02E, Broadwater County
Point of Diversion	SWSWSE Section 3, T06N, R02E, Broadwater County

FINDINGS OF FACT – Adverse Effect

17. The Applicant proposes to change the place of use of Claim 41I 831-00 from 103 acres to 264.7 acres in Section 21, T07N, R02E, in Broadwater County. The proposed place of use is north and west of the claimed place of use, all within Section 21, T07N, R02E, in Broadwater County. All of the acres that will be irrigated with Claim 41I 831-00 after this change fall outside of the footprint of the historically irrigated place of use. The proposed 264.7 acre place of use includes 181 acres which are currently irrigated by and listed on Claim 41I 30913-00 and 83.7 acres which do not have any appurtenant private water rights and are currently irrigated with BMWUA contract water only. All of the proposed 264.7 acres are within the service area for the BMWUA and receive contract water as needed. A detailed breakdown of the acreage and legal land descriptions for the proposed place of use are found in Table 2, above.

18. In an amendment to the Application requested by Abby Brown via email on January 17, 2023, the Applicant clarified their operational plan for using this Claim on 264.7 acres without exceeding historical consumptive and diverted volumes. They plan to apply the Claim over the 264.7 acres until the earlier of (1) the historical diverted volume is reached; (2) the Claim goes out of priority; or (3) the period of diversion ends. The Applicant is aware that the volume is insufficient to provide full-service irrigation to the place of use and they plan to continue using BMWUA contract water as needed.

19. No other elements of Claim 4I 831-00 are proposed for change. Under the proposed change, the Claim will continue to be diverted from Deep Creek via headgate at the High Water Spill Ditch, and will then be discharged from the High Water Spill Ditch into the Canal. To facilitate the proposed change in place of use, the Applicant plans to move the Claim's current secondary point of diversion (a pump in the Canal) approximately one-quarter mile down the Canal

(north) of the existing secondary point of diversion. From there, the water is proposed to be conveyed via an approximately 3,400-foot pipeline to the proposed sprinkler irrigation place of use. The proposed secondary pump, pipeline, and sprinkler infrastructure are already in place, as they are currently used to operate Claim 41I 30913-00 and BMWUA contract water.

20. Per DNRC's Change in Method of Irrigation Policy Memorandum dated December 2, 2015, the Department will consider the increase in efficiency for the 264.7-acre post-change irrigated place of use which falls entirely outside of the footprint of the 103-acre historically irrigated place of use. Under the proposed change, the Applicant is limited to the historic consumptive volume of Claim 41I 831-00, which is 64.9 AF. Using a sprinkler irrigation efficiency of 70%, the proposed field applied volume is 92.7 AF ($64.9 \text{ AF} / 0.70$). Irrecoverable losses for sprinkler irrigation are considered to be 10% of the field applied volume, or 9.3 AF. The proposed use does not involve conveyance losses, as the Claim will continue to divert the full flow rate at the secondary point of diversion as was done historically at which point water will be conveyed from the secondary point of diversion to the place of use via a pipeline instead of a ditch. The proposed diverted volume is therefore the same as the applied volume, 92.70 AF, which is 39.3 AF less than the historic diverted volume of 132.0 AF.

21. Claim 41I 831-00 will not be providing full-service irrigation to the proposed place of use and will be supplemented by Statement of Claim 41I 30913-00 (on a maximum of 181 acres of the place of use) and BMWUA contract water (on all proposed acres) as needed. The Claim will continue to have a remark stating that this water right is supplemental to the water delivered under contract by the Broadwater Missouri Canal.

22. There are no intervening diversions in the 0.25 miles between the historic secondary point of diversion and the proposed secondary point of diversion.

23. DNRC Groundwater Hydrologist Melissa Brickl analyzed return flows from the proposed change to determine whether existing surface water right rights will be adversely affected by the change. This analysis is contained in the Surface Water Change Report dated February 9, 2023, a copy of which is available in the Application file. This report identified that return flows under the proposed change are expected to return to the same location as they did during irrigation of the

historical place of use. The historic and proposed location of return flow accretion is in the Missouri River downstream of the southern boundary of Section 19, T07N, R02E, and in Cottonwood Creek downstream of the eastern boundary of Section 16, T07N, R02E. Under historic irrigation practices, a volume of 35.0 AF of non-consumed water returned to the locations identified. Under the proposed change, the volume of return flows will be reduced by 7.2 AF, to 27.8 AF.

24. As 39.3 AF are remaining in Deep Creek as a result of the reduced diverted volume under this change, and Deep Creek flows into the Missouri River upstream of the location of return flows, no water rights will be adversely affected by the reduction in return flows to the Missouri River. No water rights divert from Cottonwood Creek downstream of the location of historical and proposed return flows. As such, no water rights will be adversely affected by the reduction in return flows to Cottonwood Creek. Per the Department's April 1, 2016, Policy Memorandum on Return Flows, the Department will not develop a monthly return flow analysis for this change authorization without a valid objection.

25. In most recent years, there has been a Deep Creek water commissioner and water is measured at the High Water Spill Ditch with a Parshall flume. The water commissioner often does not begin administering water until Claim 41I 831-00 is out of priority.

26. The Applicant will not be able to call water rights they could not previously call. There will be no greater access to the water as a result of the proposed change.

27. There are no non-use issues.

28. The Applicant will be subject to the following measurement condition upon authorization of this change:

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASURING DEVICE AT OR NEAR THE POINT OF DIVERSION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO THAT THEY ARE ABLE TO RECORD FLOW RATE AND VOLUME OF ALL WATER DIVERTED. MEASUREMENT RECORDS SHALL BE SUBMITTED EACH YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE, AND UPON REQUEST THEREAFTER. IF AFTER PROJECT COMPLETION THE DEPARTMENT NOTIFIES THE APPROPRIATOR THAT RECORDS ARE REQUIRED TO BE SUBMITTED, FAILURE TO SUBMIT RECORDS IN A TIMELY FASHION UPON REQUEST MAY BE

CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

29. The Department finds no adverse effect will occur to other water users as a result of this change under the terms and conditions set forth in this Preliminary Determination.

BENEFICIAL USE

FINDINGS OF FACT

30. The Applicant proposes to use water for an irrigation purpose, which meets the definition of beneficial use under § 85-2-102(5), MCA.

31. Under the proposed change in place of use, Claim 41I 831-00 will be flexibly applied to 264.7 acres to supplement the use of Claim 41I 30913-00 and lessen the Applicant's reliance on BMWUA contract water. The 83.7-acre portion of the proposed place of use described in Table 2 currently has no appurtenant private water rights and is irrigated solely with BMWUA contract water. The 181-acre portion of the proposed place of use described in Table 2 is irrigated by Claim 41I 30913-00, which has an inadequate flow rate to acres ratio of 3.4 GPM/acre for its 200-acre place of use, as is affirmed by a remark on Claim 41I 30913-00.

32. The Department finds the proposed use of 374.21 GPM up to a diverted volume of 92.70 AF for an irrigation purpose of Claim 41I 831-00 to be a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

33. Under the proposed change, the means of diversion and conveyance will not change up until the secondary point of diversion. The High Water Spill Ditch headgate will continue to be used, as will the Canal.

34. The secondary point of diversion under the proposed change will be a pump in the Canal located in the SENENW Section 22, T07N, R02E, Broadwater County. From there, existing 12"

pipelines will be used to convey water to the 181-acre portion of the proposed place of use, and then on to the 83.7-acre portion place of the use.

35. The pump at the secondary point of diversion is a Cornell 5RB pump, with a 40 hp motor. A copy of the pump curve provided in the Applicant's deficiency response shows that it is designed to pump a flow rate of 1400 GPM, with 65 feet of head, while operating at 76% efficiency. This pump will also continue to be used as a secondary point of diversion for Statement of Claim 41I 30913-00, which has a maximum flow rate of 1.5 CFS. Together, Claims 41I 831-00 and 41I 30913-00 have a maximum combined flow rate of 1,047.4 GPM that will be diverted at the secondary point of diversion. The pump at the proposed secondary point of diversion is capable of pumping the 1,047.4 GPM from these two Claims, with remaining capacity for additional flow from BMWUA contract water, if needed.

36. The Department finds the Applicant's proposed diversionary operation adequate to accommodate the post-change appropriation of 374.21 GPM and 92.70 AF with Statement of Claim 41I 831-00.

POSSESSORY INTEREST

FINDINGS OF FACT

37. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

38. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An

increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).¹

39. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249

¹ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.²

40. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.³ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum

² See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

³A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁴

41. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g.*, Hohenlohe, at ¶44; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change

⁴ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo., 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); A. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁵

42. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

43. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically

⁵ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass’n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43 (citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

44. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules set forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

45. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department’s approval. Analysis of adverse effect in a change to an “existing water right” requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972

Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

46. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999)(Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996)(Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

47. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. See MacDonald, 220 Mont. at 529, 722 P.2d at 604; Featherman, 43 Mont. at 316-17, 115 P. at 986; Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004).

48. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16). In the alternative an applicant may present its own evidence of

historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF No. 13)

49. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., supra; Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

50. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim of 132 acre-feet diverted volume and 374.21 GPM flow rate with a consumptive use of 64.9 acre-feet. (FOF Nos. 9-16)

51. Based upon the Applicant’s comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF Nos. 17-29).

BENEFICIAL USE

52. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§ 85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-

2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

53. Applicant proposes to use water for an irrigation purpose which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial use and that 92.7 acre-feet of diverted volume and 374.21 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. § 85-2-402(2)(c), MCA (FOF Nos. 30-33)

ADEQUATE MEANS OF DIVERSION

54. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of

diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

55. Pursuant to § 85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 34-37)

POSSESSORY INTEREST

56. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802

57. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 38)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 41I 30152338 should be GRANTED subject to the following.

The new irrigation place of use for Claim 41I 831-00 will consist of 264.7 total acres, including the following, all within Section 21, T07N, R02E, in Broadwater County:

Acres	Quarter Sections	Section	Township	Range	County
80	E2SW	21	07N	02E	Broadwater
3.7	E2SWSW				
77	E2NW				
80	W2NE				
24	W2E2NE				
264.7					

A volume of 92.7 AF will be diverted with this water right for the purpose of sprinkler irrigation. The flow rate (374.21 GPM), point of diversion (SWSWSE Sec. 3, T06N, R02E), and periods of diversion and use (5/1 – 7/19) will remain unchanged. The Applicant will be subject to the following measurement condition under the proposed change authorization.

MEASUREMENT CONDITION

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED MEASURING DEVICE AT OR NEAR THE POINT OF DIVERSION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO THAT THEY ARE ABLE TO RECORD FLOW RATE AND VOLUME OF ALL WATER DIVERTED. MEASUREMENT RECORDS SHALL BE SUBMITTED EACH YEAR UNTIL THE CHANGE AUTHORIZATION IS PERFECTED AND THE DEPARTMENT RECEIVES A PROJECT COMPLETION NOTICE, AND UPON REQUEST THEREAFTER. IF AFTER PROJECT COMPLETION THE DEPARTMENT NOTIFIES THE APPROPRIATOR THAT RECORDS ARE REQUIRED TO BE SUBMITTED, FAILURE TO SUBMIT RECORDS IN A TIMELY FASHION UPON REQUEST MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES FLOW RATE AND VOLUME ACCURATELY.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§ 85-2-310, -312, MCA.

DATED this _____ day of _____ 20__.

/Original signed by Jennifer Daly/
Jennifer Daly, Regional Manager
Helena Regional Office
Department of Natural Resources
and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this ____ day of _____ 20__, by first class United States mail.

ABIGAIL R. BROWN
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